Supreme Court, U.S.
FILED
MAR 9 2001
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(3)

No. 00-1166

In The

Supreme Court of the United States

ROSA M. TOWNSEND,

Petitioner,

vs.

KNIGHT-RIDDER, INC. and THE MIAMI HERALD PUBLISHING CO.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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5 pp

To meet Petitioner's arguments concerning important issues of workplace law — whether there is a division amongst the circuits concerning the standard to be used in retaliation cases, and whether the approach of the Court of Appeals for the Eleventh Circuit is out of synch with the remedial approach that this Court always has taken on similar issues — Respondents make three arguments, none of which is either responsive or valid.

First, in their "Restatement of the Case," Brief in Opposition at 1-6, they sidestep the district court's statement of its sole rationale for granting summary judgment against Petitioner on her retaliation claims, i.e., that her belief that she was the victim of employment discrimination, ***albeit in good faith***, was not objectively reasonable. *See* App. 23a-25a. Respondents instead argue with great vigor their version of the disputed facts concerning whether *el Nuevo Herald* and *The Miami Herald* are separate establishments, Brief in Opposition at 1, whether Petitioner really was performing as well as she contends, *id.* at 1-3, whether Respondents had good reasons for firing Petitioner other than her complaining about sex discrimination, *id.* at 3-5, and even whether her discrimination claims (concerning which certiorari is not sought) really had merit. *Id.* at 4-5. Such a refocus obscures and ignores the overarching issue here: does federal workplace law demand a retaliation standard that protects any worker who raises her voice in good faith complaint, as opposed to only those whose complaint can be viewed in hindsight to have been objectively reasonable.

Second, Respondents argue essentially that the division between the circuits on that issue is not really that big of a division because only the Court of Appeals for the Tenth Circuit is out-of-step with the Eleventh Circuit's objective reasonableness standard. Respondents do not deny that the

standard articulated in *Jeffries v. State of Kansas*, 147 F.3d 1220 (10th Cir. 1998) and *Love v. Re/Max of Am., Inc.*, 738 F.2d 383 (10th Cir. 1984) is diametrically opposed to that followed within the Eleventh Circuit and in what Respondents characterize as "the majority of federal circuit courts..." Brief in Opposition, at 10. Respondents seek to minimize the importance of the *Jeffries/Love* standard by pointing to what they characterize as inconsistent applications of its good-faith-only requirement. They acknowledge, however, that a panel of the Tenth Circuit relied specifically upon that standard last year in *Shinwari v. Raytheon Aircraft Co.*, 215 F.3d 1337 (Table), 2000 WL 731782 (10th Cir. June 8, 2000), *cert. denied*, 121 S.Ct. 843. Respondents fail to note that the *Shinwari* court used the *Jeffries/Love* standard to reverse a summary judgment in which the district court had specifically relied upon the objectively reasonable standard articulated in *Little v. United Technologies, Carrier Transicold Division*, 103 F.2d 956, 960 (11th Cir. 1997), the first case in which the Court of Appeals for the Eleventh Circuit clearly articulated that standard. Rather than even attempt to address the split between the objective-reasonableness standard used in the instant case and the more recent published articulation of the *Love* standard in *Jeffries*, Respondents characterize the unpublished *Shinwari* opinion as relying solely on the 1984 *Love* case. Brief in Opposition, at 12-13. This obscures the current vitality of the Tenth Circuit's good-faith-only standard. It was upon both *Love* and *Jeffries*, however, that the *Shinwari* panel relied when it stated that the district court, granting summary judgment based upon Eleventh Circuit authority, had "mischaracterized our standard when it stated that the belief that antidiscrimination law has been violated must not only be subjectively in good faith, but objectively reasonable..." In summary, the conflict hardly could be sharper or more current.

Third, Respondents argue that because the district court's lengthy opinion was not published, and because the appeals court affirmed it *per curiam* and without an opinion, it does not merit certiorari. Brief in Opposition at 14-15. This argument ignores history. Among this Court's decisions that have arisen from review of *per curiam* affirmances are those in *Blum v. Stenson*, 465 U.S. 886 (1984)[1] and *Connick v. Myers*, 461 U.S. 138 (1983).[2] This Court reviewed a *pèr curiam* affirmance recently in *Carter v. United States*, 530 U.S. 255 (2000),[3] in which a 5-4 majority of the Court abrogated contrary published opinions of two other courts of appeal. As noted in *Smith v. United States*, 502 U.S. 1017 (1991), Blackmun, J., dissenting from denial of certiorari,

> The fact that the Court of Appeals' opinion is unpublished is irrelevant. Nonpublication must not be a convenient means to prevent review. An unpublished opinion may have a lingering effect in the Circuit and surely is as important to the parties concerned as is a published opinion.

Id. at 1020, n. 1.

The case at bar is one which concerns an important federal issue, not the disputed evidentiary minutiae of summary judgment. The issue — whether workers will be subjected to retaliation without recourse for voicing objections to what they in good faith perceive to be violations of federal workplace legislation — is one on which the Courts of Appeal for the

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[1] *See Stenson v. Blum*, 671 493 (2nd Cir. 1981) (Table).

[2] *See Myers v. Connick*, 654 F.2d 619 (5th Cir. 1981) (Table).

[3] *See United States v. Carter*, 185 F.3d 863 (3rd Cir. 1999) (Table).

Tenth and Eleventh Circuits sharply disagree. The unpublished character of the Court of Appeals' *per curiam* affirmance of the district court's opinion is irrelevant.

This Court should grant certiorari.

Respectfully submitted,

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